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Retina Associates Medical Group, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

RETINA ASSOCIATES MEDICAL)
GROUP, INC., individually and on)
behalf of all others similarly situated,)
Plaintiff,)
v.)
EYESUPPLY USA, INC., and)
GREGORY CHARLES STOCKFORD,)
Defendants.)

CLASS ACTION
JUNK-FAX COMPLAINT
JURY TRIAL DEMANDED

Plaintiff Retina Associates Medical Group, Inc., brings this class action under Rule 23 of the Federal Rules of Civil Procedure against Defendants EYESUPPLY USA, INC., and GREGORY CHARLES STOCKFORD, for their violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), and the regulations promulgated thereunder.

JURISDICTION AND VENUE

1. This Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227.

1 12. On information and belief, Defendants have sent other facsimile
2 transmissions of material advertising the quality or commercial availability of
3 property, goods, or services to Plaintiff and to at least 40 other persons as part of
4 a plan to broadcast fax advertisements, of which the Fax is an example, or,
5 alternatively, the Fax was sent on Defendants' behalf.

6 13. On information and belief, Defendants approved, authorized and
7 participated in the scheme to broadcast fax advertisements by (a) directing a list
8 to be purchased or assembled, (b) directing and supervising employees or third
9 parties to send the faxes, (c) creating and approving the fax form to be sent, and
10 (d) determining the number and frequency of the facsimile transmissions.

11 14. Defendants had a high degree of involvement in, actual notice of, or
12 ratified the unlawful fax broadcasting activity and failed to take steps to prevent
13 such facsimile transmissions.

14 15. Defendants created, made, or ratified the sending of the Fax and
15 other similar or identical facsimile advertisements to Plaintiff and other
16 members of the "Class" as defined below.

17 16. The Fax to Plaintiff and, on information and belief, the similar
18 facsimile advertisements sent by Defendants, lacked a proper notice informing
19 the recipient of the ability and means to avoid future unsolicited advertisements.

20 17. Under the TCPA and 47 C.F.R. § 64.1200(a)(4)(iii), the opt-out
21 notice for unsolicited faxed advertisements must meet the following criteria:

- 22 (A) The notice is clear and conspicuous and on the first page of the
23 advertisement;
- 24 (B) The notice states that the recipient may make a request to the
25 sender of the advertisement not to send any future
26 advertisements to a telephone facsimile machine or machines
27 and that failure to comply, within 30 days, with such a request
28 meeting the requirements under paragraph (a)(4)(v) of this
section is unlawful;
- (C) The notice sets forth the requirements for an opt-out request
under paragraph (a)(4)(v) of this section

1 (D) The notice includes—

2 (1) A domestic contact telephone number and facsimile
3 machine number for the recipient to transmit such a
4 request to the sender; and

5 (2) If neither the required telephone number nor facsimile
6 machine number is a toll-free number, a separate cost-
7 free mechanism including a Web site address or e-mail
8 address, for a recipient to transmit a request pursuant to
9 such notice to the sender of the advertisement. A local
10 telephone number also shall constitute a cost-free
11 mechanism so long as recipients are local and will not
12 incur any long distance or other separate charges for calls
13 made to such number; and

14 (E) The telephone and facsimile numbers and cost-free mechanism
15 identified in the notice must permit an individual or business to
16 make an opt-out request 24 hours a day, 7 days a week.

17 18. The Fax and, on information and belief, Defendants' similar
18 facsimile advertisements lacked a notice stating that the recipient may make a
19 request to the sender of the advertisement not to send future advertisements to a
20 telephone facsimile machine or machines and that failure to comply, within 30
21 days, with such a request meeting 47 C.F.R. § 64.1200(a)(4)(v)'s requirements is
22 unlawful.

23 19. The transmissions of facsimile advertisements, including the Fax, to
24 Plaintiff, lacked a notice that complied with 47 U.S.C. § 227(b)(1)(C) and 47
25 C.F.R. § 64.1200(a)(4)(iii).

26 20. On information and belief, Defendants faxed the same or other
27 substantially similar facsimile advertisements to the members of the Class in
28 California and throughout the United States without first obtaining the
recipients' prior express invitation or permission.

21 21. Defendants violated the TCPA by transmitting the Fax to Plaintiff
22 and to the Class members without obtaining their prior express invitation or
23 permission and by not displaying the proper opt-out notice required by 47 C.F.R.
24 § 64.1200(a)(4).

1 22. Defendants knew or should have known that (a) facsimile
2 advertisements, including the Fax, were advertisements, (b) Plaintiff and the
3 other Class members had not given their express invitation or permission to
4 receive facsimile advertisements, (c) no established business relationship existed
5 with Plaintiff and the other Class members, and (d) Defendants' facsimile
6 advertisements did not display a proper opt-out notice.

7 23. Pleading in the alternative to the allegations that Defendants
8 knowingly violated the TCPA, Plaintiff alleges that Defendants did not intend to
9 send transmissions of facsimile advertisements, including the Fax, to any person
10 where such transmission was not authorized by law or by the recipient, and to
11 the extent that any transmissions of facsimile advertisement was sent to any
12 person and such transmission was not authorized by law or by the recipient, such
13 transmission was made based on Defendants' own understanding of the law or
14 on the representations of others on which Defendants reasonably relied.

15 24. The transmissions of facsimile advertisements, including the Fax, to
16 Plaintiff and the Class caused concrete and personalized injury, including
17 unwanted use and destruction of their property, e.g., toner or ink and paper,
18 caused undesired wear on hardware, interfered with the recipients' exclusive use
19 of their property, cost them time, occupied their fax machines for the period of
20 time required for the electronic transmission of the data, and interfered with their
21 business or personal communications and privacy interests.

22 **CLASS ACTION ALLEGATIONS**

23 25. Plaintiff brings this class action on behalf of the following class of
24 persons, hereafter, the "Class":
25
26
27
28

1 All persons in the United States who on or after four years prior to the
2 filing of this action, (1) were sent by or on behalf of Defendants a
3 telephone facsimile message of material advertising the commercial
4 availability or quality of any property, goods, or services, (2) with
5 respect to whom Defendants cannot provide evidence of prior express
6 invitation or permission for the sending of such fax or (3) with whom
7 Defendants did not have an established business relationship, and (4)
8 the fax identified in subpart (1) of this definition (a) did not display a
9 clear and conspicuous opt-out notice on the first page stating that the
recipient may make a request to the sender of the advertisement not to
send any future advertisements to a telephone facsimile machine or
machines and that failure to comply, within 30 days, with such a
request meeting the requirements under 47 C.F.R. § 64.1200(a)(4)(v)
is unlawful, (b) lacked a telephone number for sending the opt-out
request, or (c) lacked a facsimile number for sending the opt-out
request.

10 26. Excluded from the Class are Defendants, their employees, agents,
11 and members of the judiciary.

12 27. This case is appropriate as a class action because:

13 a. Numerosity. On information and belief, based in part on review of
14 the sophisticated Fax and online research, the Class includes at least 40
15 persons and is so numerous that joinder of all members is impracticable.

16 b. Commonality. Questions of fact or law common to the Class
17 predominate over questions affecting only individual Class members, e.g.:

- 18 i. Whether Defendants engaged in a pattern of sending
19 unsolicited fax advertisements;
- 20 ii. Whether the Fax, and other faxes transmitted by or on behalf
21 of Defendants, contains material advertising the commercial
22 availability of any property, goods or services;
- 23 iii. Whether the Fax, and other faxes transmitted by or on behalf
24 of Defendants, contains material advertising the quality of any
25 property, goods or services;
- 26 iv. The manner and method Defendants used to compile or obtain
27 the list of fax numbers to which Defendants sent the Fax and
28 other unsolicited faxed advertisements;
- v. Whether Defendants faxed advertisements without first
obtaining the recipients' prior express invitation or permission;
- vi. Whether Defendants violated 47 U.S.C. § 227;

- vii. Whether Defendants willfully or knowingly violated 47 U.S.C. § 227;
- viii. Whether Defendants violated 47 C.F.R. § 64.1200;
- ix. Whether the Fax, and the other fax advertisements sent by or on behalf of Defendants, displayed the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4);
- x. Whether the Court should award statutory damages per TCPA violation per fax;
- xi. Whether the Court should award treble damages per TCPA violation per fax; and
- xii. Whether the Court should enjoin Defendants from sending TCPA-violating facsimile advertisements in the future.

c. Typicality. Plaintiff's claim is typical of the other Class members' claims, because, on information and belief, the Fax was substantially the same as the faxes sent by or on behalf of Defendants to the Class, and Plaintiff is making the same claim and seeking the same relief for itself and all Class members based on the same statute and regulation.

d. Adequacy. Plaintiff will fairly and adequately protect the interests of the other Class members. Plaintiff's counsel is experienced in TCPA class actions, having litigated many such cases, and having been appointed class counsel in multiple cases. Neither Plaintiff nor its counsel has interests adverse or in conflict with the Class members.

e. Superiority. A class action is the superior method for adjudicating this controversy fairly and efficiently. The interest of each individual Class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

28. The TCPA prohibits the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1).

1 29. The TCPA defines “unsolicited advertisement,” as “any material
2 advertising the commercial availability or quality of any property, goods, or
3 services which is transmitted to any person without that person’s express
4 invitation or permission.” 47 U.S.C. § 227(a)(4).

5 30. The TCPA provides:

6 Private right of action. A person may, if otherwise permitted by the
7 laws or rules of court of a state, bring in an appropriate court of that
8 state:

8 (A) An action based on a violation of this subsection or the
9 regulations prescribed under this subsection to enjoin such
10 violation,

10 (B) An action to recover for actual monetary loss from such a
11 violation, or to receive \$500 in damages for each such
12 violation, whichever is greater, or

12 (C) Both such actions.

13 47 U.S.C. § 227(b)(3)(A)-(C).

14 31. The TCPA also provides that the Court, in its discretion, may treble
15 the statutory damages if a defendant “willfully or knowingly” violated Section
16 227(b) or the regulations prescribed thereunder.

17 32. Defendants’ actions caused concrete and particularized harm to
18 Plaintiff and the Class, as

19 a. receiving Defendants’ faxed advertisements caused the recipients to
20 lose paper and toner consumed in printing Defendants’ faxes;

21 b. Defendants’ actions interfered with the recipients’ use of the
22 recipients’ fax machines and telephone lines;

23 c. Defendants’ faxes cost the recipients time, which was wasted time
24 receiving, reviewing, and routing the unlawful faxes, and such time
25 otherwise would have been spent on business activities; and

26 d. Defendants’ faxes unlawfully interrupted the recipients’ privacy
27 interests in being left alone and intruded upon their seclusion.
28

1 33. Defendants intended to cause damage to Plaintiff and the Class, to
2 violate their privacy, to interfere with the recipients' fax machines, or to
3 consume the recipients' valuable time with Defendants' advertisements;
4 therefore, treble damages are warranted under 47 U.S.C. § 227(b)(3).

5 34. Defendants knew or should have known that (a) Plaintiff and the
6 other Class members had not given express invitation or permission for
7 Defendants or anyone else to fax advertisements about Defendants' property,
8 goods, or services, (b) Defendants did not have an established business
9 relationship with Plaintiff and the other Class members, (c) the Fax and the other
10 facsimile advertisements were advertisements, and (d) the Fax and the other
11 facsimile advertisements did not display the proper opt-out notice.

12 35. Defendants violated the TCPA by transmitting the Fax to Plaintiff
13 and substantially similar facsimile advertisements to the other Class members
14 without obtaining their prior express invitation or permission and by not
15 displaying the proper opt-out notice required by 47 C.F.R. § 64.1200(a)(4)(iii).

16 WHEREFORE, Plaintiff, for itself and all others similarly situated,
17 demands judgment against Defendants, jointly and severally, as follows:

- 18 a. certify this action as a class action and appoint Plaintiff as Class
19 representative;
- 20 b. appoint the undersigned counsel as Class counsel;
- 21 c. award damages of \$500 per TCPA violation per facsimile pursuant
22 to 47 U.S.C. § 227(a)(3)(B);
- 23 d. award treble damages up to \$1,500 per TCPA violation per
24 facsimile pursuant to 47 U.S.C. § 227(a)(3);
- 25 e. enjoin Defendants and their contractors, agents, and employees
26 from continuing to send TCPA-violating facsimiles pursuant to 47
27 U.S.C. § 227(a)(3)(A);

- 1 f. award class counsel reasonable attorneys' fees and all expenses of
2 this action and require Defendants to pay the costs and expenses of
3 class notice and claim administration;
4 g. award Plaintiff an incentive award based upon its time expended on
5 behalf of the Class and other relevant factors;
6 h. award Plaintiff prejudgment interest and costs; and
7 i. grant Plaintiff all other relief deemed just and proper.

8 **DOCUMENT PRESERVATION DEMAND**

9 Plaintiff demands that Defendants take affirmative steps to preserve all
10 records, lists, electronic databases, or other itemization of telephone or fax
11 numbers associated with the Defendants and the communication or transmittal of
12 advertisements as alleged herein.

13
14 DATED: August 16, 2018

EDWARDS POTTINGER LLC

15
16 By: /s/ Seth M. Lehrman

Seth M. Lehrman

Attorney for Plaintiff

17 RETINA ASSOCIATES MEDICAL GROUP,
18 INC.